TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915

No. 481

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

JOE FREEMAN.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KANSAS.

FILED MAY 20, 1916.

(24,795)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 1009.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

JOE FREEMAN.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

INDEX.

1 In the District Court of the United States, District of Kansas, Third Division.

UNITED STATES OF AMERICA, PLAINTIFF, *v.* FRANK W. POTTS AND JOE FREEMAN, DEFENDANTS.	No. 372. Criminal.

Citation.

UNITED STATES OF AMERICA: *ss.*

The President of the United States: To Joe Freeman, greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, in the city of Washington, in the District of Columbia, in the United States of America, within thirty (30) days from the date hereof, pursuant to a writ of error issued out of the Supreme Court of the United States upon the 17th day of May, 1915, and filed in the office of the clerk of said court, in a cause heretofore pending in the District Court of
2 the United States for the District of Kansas, entitled as above, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the decision and judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable John C. Pollock, judge of the United States Court for the District of Kansas, this 17th day of May, 1915.

JOHN C. POLLOCK,
Judge of the United States Court for the District of Kansas, Third Division.

Attest:
[SEAL.]

MORTON ALBAUGH,
Clerk of the United States Court for the District of Kansas, Third Division.
By C. B. WHITE,
Deputy Clerk.

I, the undersigned attorney of record for the defendant in error in the above entitled case, do hereby acknowledge due and proper service of the foregoing citation and enter my appearance in the Supreme Court of the United States of America.

Done at Joplin, in the State and Western District of Missouri, this 19th day of May, 1915.

PAUL A. EWERT,
Attorney for Defendant in Error.

3 (Indorsed:) No. 372. Criminal. In the District Court of the United States, District of Kansas, Third Division. United

States of American, plaintiff, *v.* Frank W. Potts and Joe Freeman, defendants. Citation. Filed May 22, 1915. Morton Albaugh, clerk. By C. B. White, dept. clk.

4 In the District Court of the United States, District of Kansas, Third Division.

UNITED STATES OF AMERICA, PLAINTIFF,
v.
FRANK W. POTTS AND JOE FREEMAN, DEFENDANTS. } No. 372. Criminal.

Writ of error.

The President of the United States to the Honorable John C. Pollock, judge of the District Court of the United States for the District of Kansas, greeting:

Because in the record and proceedings, as also in the rendition of the decision and judgment of a plea which is in the said court before you, between the United States of America, plaintiff in error, and Joe Freeman, defendant in error, a manifest error hath happened, to the great damage of the said United States of America, plaintiff in error, as by its complaint appears:

We being willing that error if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record
5 and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the seventeenth day of June, 1915, within the United States of America, to be then and there held, that the record and proceedings aforesaid be inspected and the said Supreme Court of the United States of America may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable E. D. White, Chief Justice of the United States of America, the seventeenth day of May, in the year of our Lord one thousand nine hundred and fifteen.

[SEAL.] MORTON ALBAUGH,
Clerk of the United States Court for the District of Kansas, Third Division.
By C. B. WHITE, *Deputy Clerk.*

Allowed by—

JOHN C. POLLOCK,
Judge of the United States Court for the District of Kansas, Third Division.

6 *Return to writ.*

UNITED STATES OF AMERICA,
Third Division of the Judicial District of Kansas, ss.

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States of America a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of said district court, at office in the city of Fort Scott, this 22" day of May, A. D. 1915.

[SEAL.]

MORTON ALBAUGH,
Clerk of said Court.
By C. B. WHITE,
Deputy Clerk.

(Indorsed:) No. 372. Criminal. In the District Court of the United States, District of Kansas, Third Division. United States of America, plaintiff, *v.* Frank W. Potts and Joe Freeman, defendants. Writ of error. Filed May 17", 1915. Morton Albaugh, Clerk. By C. B. White, Dept. Clk.

7 *Citation.*

In the District Court of the United States, District of Kansas, Third Division.

UNITED STATES OF AMERICA, PLAINTIFF, *v.* FRANK W. POTTS AND JOE FREEMAN, DEFENDANTS.	No. 372. Criminal.

Citation.

UNITED STATES OF AMERICA: *ss.*

The President of the United States: To Joe Freeman, greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, in the city of Washington, in the District of Columbia, in the United States of America, within thirty (30) days from the date hereof, pursuant to a writ of error issued out of the Supreme Court of the United States upon the 17th day of May, 1915, and filed in the office of the clerk of said court, in a cause heretofore pending in the District Court of the United States for the District of Kansas, entitled as above, wherein the United States of America is plaintiff in error and you are defendant

8 in error, to show cause, if any there be, why the decision and judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable John C. Pollock, judge of the United States Court for the District of Kansas, this 17th day of May, 1915.

JOHN C. POLLOCK,
Judge of the United States Court for the District of Kansas, Third Division.

Attest:

MORTON ALBAUGH,
Clerk of the United States Court for the District of Kansas, Third Division.

[Seal U. S. District Court, Dist. of Kansas, Third Division.]

By C. B. WHITE, *Deputy Clerk.*

I, the undersigned attorney of record for the defendant in error in the above entitled case, do hereby acknowledge due and proper service of the foregoing citation and enter my appearance in the Supreme Court of the United States of America.

Done at Joplin, in the State and Western District of Missouri, this 19th day of May, 1915.

PAUL A. EWERT,
Attorney for Defendant in Error.

(Indorsed:) No. 372. Criminal. In the District Court of the United States, District of Kansas, Third Division. United States of America, plaintiff, v. Frank W. Potts and Joe Freeman, defendants. Citation. Filed May 22", 1915, Morton Albaugh, Clerk. By C. B. White, Dep. Clk.

9 *Writ of error.*

In the District Court of the United States, District of Kansas, Third Division.

UNITED STATES OF AMERICA, PLAINTIFF,
v.
FRANK W. POTTS AND JOE FREEMAN, DEFENDANTS. } No. 372. Criminal.

Writ of error.

The President of the United States to the Honorable John C. Pollock, judge of the District Court of the United States for the District of Kansas, greeting:

Because in the record and proceedings, as also in the rendition of the decision and judgment of a plea which is in the said court before you, between the United States of America, plaintiff in error, and Joe Freeman, defendant in error, a manifest error hath happened, to the great damage of the said the United States of America, plaintiff in error, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that

then, under your seal, distinctly and openly, you send the
10 record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the seventeenth day of June, 1915, within the United States of America, to be then and there held, that the record and proceedings aforesaid be inspected and the said the Supreme Court of the United States of America may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable E. D. White, Chief Justice of the United States of America, the seventeenth day of May, in the year of our Lord one thousand nine hundred and fifteen.

[Seal U. S. District Court, Dist. of Kansas, Third Division.]

MORTON ALBAUGH,
Clerk of the United States Court for the District of Kansas, Third Division.
By C. B. WHITE, *Deputy Clerk.*

Allowed by:

JOHN C. POLLOCK,
Judge of the United States Court for the District of Kansas, Third Division.

Return to writ.

UNITED STATES OF AMERICA,
Third Division of the Judicial District of Kansas, ss.

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States of America a
11 duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said District Court, at office in the city of Fort Scott, this 22" day of May, A. D. 1915.

MORTON ALBAUGH,
Clerk of said Court.

[Seal U. S. District Court, Dist. of Kansas, Third Division.]

By C. B. WHITE,
Deputy Clerk.

(Indorsed:) No. 372. Criminal. In the District Court of the United States, District of Kansas, Third Division. United States of America, plaintiff, v. Frank W. Potts and Joe Freeman, defendants. Writ of error. Filed May 17", 1915. Morton Albaugh, clerk, by C. B. White, Dep. Clk.

Be it remembered that at a term of the District Court of the United States for the District of Kansas, Third Division, begun and held at the city of Fort Scott in said district and division on Monday, the

9th day of November, A. D. 1914, proceedings were had as follows: (Honorable Arba S. Van Valkenburgh, U. S. district judge by assignment, presiding.)

MONDAY, NOVEMBER 9TH, 1914.

Now come the grand jurors into open court and through their foreman present bills of indictment in the following cases, to wit:

12 UNITED STATES, PLAINTIFF,
vs.
FRANK W. POTTS AND JOE FREEMAN, DEFENDANTS. } No. 372.

Which indictment being filed by the clerk, it is ordered that this case be docketed and bond fixed in the sum of $500.00 for each defendant.

And the grand jurors, through their foreman, report to the court that they have no further business before them; thereupon it is by the court ordered that the members of the grand jury be discharged from further attendance on this court.

Indictment.

THE UNITED STATES OF AMERICA,
The District of Kansas, Third Division, ss.

In the District Court of the United States, within and for the Third Division of the District of Kansas, at the November term thereof, A. D. 1914.

The grand jurors of the United States, within and for the Third Division of the District of Kansas, at Fort Scott, impaneled, sworn, and charged at the term aforesaid of the court aforesaid, on their oath present and charge that one Frank W. Potts and Joe Freeman, on or about the 18th day of February, A. D. 1914, in said division of said district, and within the jurisdiction of said court, in the county of Cherokee and State of Kansas, then and there being, did then and there willfully, knowingly, and unlawfully ship
13 and cause to be shipped from the city of Joplin, in the county of Jasper, State of Missouri, into the county of Cherokee and the State of Kansas, six trunks containing spirituous and intoxicating liquor, said trunks being described as follows, to-wit:

One trunk, containing four dozen quarts of whisky.

One trunk, containing three five-gallon kegs of gin.

Four trunks, each containing three five-gallon kegs of whiskey.

Said packages, to wit, the six trunks hereinbefore described, then and there having no label on the outside cover to show the name of the consignee, the nature of the contents of said packages, and the quantity contained therein, and that said packages, all the while they were then and there being so shipped, did not have any label of any kind whatsoever on the outside cover to plainly show the name of the consignee, the nature of its contents, and the quantity con-

tained therein; and this they did, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

FRANCIS M. BRADY,
Assistant U. S. Attorney.

Witnesses: H. M. Conklin, depy. special agt., Indian Service, Denver, Colo. Claud Small, depy. special agt., Indian Service, Denver, Colo. Ralph E. Martin, sheriff, Columbus, Kan. J. H. Molyneux, depy. sheriff, Columbus, Kan. O. Cogill, operator, ticket clk., M. K. T. Ry., Columbus, Kan. N. Milligan, depot master, Frisco, Joplin, Mo. Jim Older, transfer man, Columbus, Kan. S. L. Day, night operator, Frisco, Columbus, Kan. H. J. Mead, depy. U. S. marshal, Joplin, Mo.

(Indorsed:) No. 372. In the District Court of the United States, District of Kansas, Third Division. United States vs. Frank W. Potts and Joe Freeman. Indictment. Violation sec. 240 Code. Penalty: Not more than $5,000 fine and forfeiture of liquor and packages seized. A true bill, A. K. Lanyon, foreman. Filed Nov. 9, 1914, Morton Albaugh, clerk, by C. B. White, dep. clk. Francis M. Brady, asst. U. S. attorney. Bond $500.00 each deft. Arba S. Van Valkenburgh, judge.

14 *Motion to quash.*

UNITED STATES OF AMERICA,
The District of Kansas, Third Division, ss.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
FRANK W. POTTS AND JOE FREEMAN, DEFENDANTS. } No. 372.

Motion to quash.

Comes now the defendant in the above-entitled cause, Joe Freeman, in his own proper person and by his attorney, Paul A. Ewert, and moves to quash the indictment herein upon the following grounds to wit:

First. That this court is without jurisdiction to hear and try in this district the offense sought to be charged in the indictment; that the offense charged in the indictment, if any, appears upon the face of the indictment to have been committed in the city of Joplin, in the county of Jasper, and in the State of Missouri, and without the jurisdiction of this court.

Second. That the indictment does not state facts sufficient to constitute against the defendant, Joe Freeman, any offense whatever against the laws of the United States, and does not charge the commission by him of any offense against the laws of the United States.

15 Wherefore, and for want of sufficient indictment in that behalf, the said defendant, Joe Freeman, prays judgment that the indictment herein be quashed and that he be by the court herein dismissed and discharged of the said indictment.

PAUL A. EWERT,
Attorney for Defendant, Joe Freeman.

(Indorsed:) No. 372. In the District Court of the United States, District of Kansas, Third Division. United States vs. Frank W. Potts and Joe Freeman. Indictment. Violation Sec. 240 Code. Penalty: Not more than $5,000 fine and forfeiture of liquor and packages seized. Motion to quash. Filed May 3, 1915, Morton Albaugh, clerk, by C. B. White, dep. clk.

Demurrer to indictment.

UNITED STATES OF AMERICA,
The District of Kansas, Third Division, ss.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
FRANK W. POTTS AND JOE FREEMAN, DEFENDANTS. } No. 372.

Demurrer to indictment.

Comes now the defendant in the above entitled cause, Joe Freeman, in person and by his attorney, Paul A. Ewert, and demurs to the indictment herein upon the following grounds, to-wit:

16 First. That the indictment does not state facts sufficient to constitute against the defendant, Joe Freeman, any offense whatever against the laws of the United States, and does not charge the commission by him of any offense against the laws of the United States.

Second. That this court is without jurisdiction to hear and try in this district the offense sought to be charged in the indictment; that the offense charged in the indictment, if any, appears upon the face of the indictment to have been committed in the city of Joplin, in the county of Jasper, and in the State of Missouri, and without the jurisdiction of this court.

Wherefore, and for want of sufficient indictment in that behalf, the said defendant, Joe Freeman, prays judgment that he be by the court herein dismissed and discharged of the said indictment.

PAUL A. EWERT,
Attorney for Defendant, Joe Freeman.

(Indorsed:) No. 372. In the District Court of the United States, District of Kansas, Third Division. United States vs. Frank W. Potts and Joe Freeman. Indictment. Violation sec. 240 Code.

Penalty: Not more than $5,000 fine and forfeiture of liquor and packages seized. Demurrer to indictment. Filed May 3, 1915, Morton Albaugh, clerk, by C. B. White, dep. clk.

17 *Order sustaining motion to quash and demurrer to indictment.*

UNITED STATES, PLAINTIFF,
vs.
FRANK W. POTTS AND JOE FREEMAN, DEFENDANTS. } No. 382.

Now, on this 4th day of May, A. D. 1915, this cause coming on to be heard upon the motion of the defendant Joe Freeman to quash the indictment herein and also upon the demurrer of the defendant Joe Freeman to the idictment; the plaintiff appearing by Fred Robertson, United States attorney, and the defendant Joe Freeman appearing by Paul A. Ewert, his attorney, and the matter being argued to the court and the court being fully advised in the premises.

It is ordered that said motion to quash and said demurrer to the indictment be, and the same are hereby, sustained, and the case is ordered dismissed as to defendant Joe Freeman; to which ruling of the court the plaintiff excepted and excepts.

It is further ordered that the said defendant Joe Freeman be discharged and go hence without day and his bond the sureties thereon released.

Entered in Journal "D" at page 250.

18 *Memoranda of decision.*

In the District Court of the United States, District of Kansas, Third Division.

UNITED STATES OF AMERICA, PLAINTIFF,
v.
FRANK W. POTTS AND JOE FREEMAN, DEFENDANTS. } N. 372.

Memoranda of decision on motion to quash indictment and on demurrer to indictment.

The defendants were indicted November 9th, 1914, charged, under section 240 of the Penal Code of the United States, with shipping and causing to be shipped interstate from the city of Joplin, in the State of Missouri, into the county of Cherokee, in the State of Kansas, six trunks containing spirituous and intoxicating liquor without labeling the same on the outside cover to show the name of the consignee, the nature of the contents of the packages, and the quantity contained therein.

The defendant Joe Freeman presented his motion to quash and his demurrer to the indictment, the grounds of each of which are identi-

cal and both of which were argued together. The grounds upon which the motion to quash and the demurrer are predicated as *as* follows:

19

I.

"That the indictment does not state facts sufficient to constitute against the defendant Joe Freeman any offense whatever against the laws of the United States, and does not charge the commission by him of any offense against the laws of the United States.

II.

"That this court is without jurisdiction to hear and try in this district the offense sought to be charged in the indictment; that the offense charged in the indictment, if any, appears upon the face of the indictment to have been committed in the city of Joplin, in the county of Jasper, and in the State of Missouri, and without the jurisdiction of this court."

The important question in this case is one of jurisdiction. The indictment, had it been returned in the proper district, undoubtedly states an offense under section 240 of the Penal Code, which section, so far as applicable to this case, reads:

"Whoever shall knowingly ship, or cause to be shipped, from one State, ... into any other State, ... any package of or package containing any spirituous . . . or other intoxicating liquor of any kind, unless such package be so labeled on the outside cover as to plainly show the name of the consignee, the nature of its contents, and the quantity contained therein, shall be fined not more than five thousand dollars."

The offense defined in this section is that of shipping or causing to be shipped interstate intoxicating liquor in packages which are not marked as required therein. The offense was completed whenever the packages were delivered for shipment. It is not a continuing offense, begun in one judicial district and completed in another, as contemplated by section 731 of the Revised Statutes of the United States, which provides:

"When any offense against the United States is begun in one judicial circuit and completed in another it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, or punished in either district, in the same manner as if it had been actually and wholly committed therein."

20 The offense being completed when the trunks were delivered for shipment, it follows that the district in which the city of Joplin, in the State of Missouri, is located, has the exclusive jurisdiction for the prosecution of the offense, and the same, for that reason, cannot be prosecuted in Kansas. A case in point, and which is here followed by the court on this question, is Davis v. United States, 104 Federal, 136.

It follows, therefore, that section 731 of the Revised Statutes, when applied to section 240 of the Penal Code, does not confer jurisdiction upon the district of Kansas to prosecute the defendant under this indictment.

Therefore, the motion to quash and the demurrer to the indictment must be sustained. It is so ordered.

To each and all of which the Government at the time duly excepted.

JOHN C. POLLOCK, *Judge.*

FORT SCOTT, KANSAS, *May fourth, 1915.*

(Indorsed:) No. 372 Criminal. In the District Court of the United States, District of Kansas, Third Division. United States of America, plaintiff v. Frank W. Potts and Joe Freeman, defendants. Memoranda of decision on motion to quash indictment and on demurrer to indictment. Filed May 4th, 1915, Morton Albaugh, clerk, by C. B. White, dep. clk.

21 *Petition for writ of error.*

In the District Court of the United States, District of Kansas, Third Division.

UNITED STATES OF AMERICA, PLAINTIFF, *v.* FRANK W. POTTS AND JOE FREEMAN, DEFENDANTS.	No. 372. Criminal.

Petition for writ of error.

Considering itself aggrieved by the final decision of the United States District Court for the District of Kansas in rendering judgment against it upon May 4th, 1915, quashing the indictment in the above entitled case, and also sustaining a demurrer to the said indictment, the plaintiff hereby prays a writ of error from said decision and judgment to the Supreme Court of the United States of America.

Said decision and judgment quashing the said indictment and sustaining the demurrer thereto is based on a construction of the statute upon which the said indictment is founded, said statute being section 240 of the Penal Code of the United States. Assignments of errors filed herewith.

FRED ROBERTSON,
United States Attorney for the District of Kansas.

(Indorsed:) No. 372. Criminal. In the District Court of the United States, District of Kansas, Third Division. United States of America, plaintiff, v. Frank W. Potts and Joe Freeman, defendants. Petition for writ of error. Filed May 15, 1915, Morton Albaugh, clerk, by C. B. White, dep. clk. Fred Robertson, United States attorney, Topeka, Kansas.

22 *Assignment of errors.*

In the District Court of the United States, District of Kansas, Third Division.

UNITED STATES OF AMERICA, PLAINTIFF, v. FRANK W. POTTS AND JOE FREEMAN, DEFENDANTS.	No. 372. Criminal.

Assignment of errors.

Now comes the above-named plaintiff in error, the United States of America, and files herewith its petition for a writ of error, and says that there are errors in the records and proceedings of the above-entitled case, and for the purpose of having the same reviewed by the Supreme Court of the United States of America, makes the following assignment of errors:

The District Court of the United States for the District of Kansas erred in holding and deciding that the motion of the defendant in error, Joe Freeman, to quash the indictment and his demurrer to the indictment should be sustained, and further erred in rendering judgment in favor of the defendant in error and against the plaintiff in error, pursuant to its ruling upon said motion and demurrer.

Said errors are more particularly set forth as follows:

Said District Court of the United States for the District of Kansas erred in holding and in deciding:

23 First. The court erred in its decision quashing the indictment and sustaining the demurrer thereto, for the reason that the United States Court for the District of Kansas was without jurisdiction to hear and try the case, and thus erred in its construction of the statute, section 240 of the Penal Code, on which the indictment was based.

Second. The court erred in its decision that section 731 of the Revised Statutes, when applied to said section 240 of the Penal Code, did not confer jurisdiction upon the United States Court for the District of Kansas to try the defendant upon the charge set forth in the indictment in this case.

For which errors the plaintiff in error, the United States of America, prays that said judgment of the District Court of the United States for the District of Kansas, Third Division, rendered upon May 4th, 1915, be reversed, and the said court directed to overrule the said motion to quash said indictment and the said demurrer to said indictment, and for costs.

FRED ROBERTSON,
United States Attorney for the District of Kansas.

(Indorsed:) No. 372. Criminal. In the District Court of the United States, District of Kansas, Third Division. United States of America, plaintiff, v. Frank W. Potts and Joe Freeman, defendants. Assignment of errors. Filed May 15, 1915, Morton Albaugh, clerk, by C. B. White, dep. clk. Fred Robertson, United States attorney, Topeka, Kansas.

24 *Order allowing writ of error.*

In the District Court of the United States, District of Kansas, Third Division.

UNITED STATES OF AMERICA, PLAINTIFF, *v.* FRANK W. POTTS AND JOE FREEMAN, DEFENDANTS.	No. 372. Criminal.

Order allowing writ of error.

On this 15th day of May, 1915, this the above-entitled cause comes on for hearing before the Honorable John C. Pollock, judge of the District Court of the United States for the District of Kansas, Third Division, sitting at his chambers, upon motion of Fred Robertson, United States attorney for the District of Kansas and attorney for the plaintiff, and upon filing a petition for a writ of error and an assignment of errors, it is ordered that a writ of error be, and hereby is, allowed, to review in the Supreme Court of the United States of America the decision and judgment heretofore entered herein.

JOHN C. POLLOCK,
Judge of the District Court of the United States for the District of Kansas, Third Division.

(Indorsed:) No. 372. Criminal. In the District Court of the United States, District of Kansas, Third Division. United States of America, plaintiff, v. Frank W. Potts and Joe Freeman, defendants. Order allowing writ of error. Filed May 17", 1915, Morton Albaugh, clerk, by C. B. White, dep. clk. Recorded in Journal "D," page 269.

25 *Præcipe for transcript.*

In the District Court of the United States, District of Kansas, Third Division.

UNITED STATES OF AMERICA, PLAINTIFF, *v.* FRANK W. POTTS AND JOE FREEMAN, DEFENDANTS.	No. 372. Criminal.

Præcipe.

To Morton Albaugh, Clerk of said Court:

You are requested to make a transcript of record, to be filed in the Supreme Court of the United States, pursuant to writ of error allowed in the above-entitled cause, and to include in such transcript of record the following and no other papers and exhibits, to-wit:

Report of grand jury upon return of indictment.
Order for filing indictment.
The indictment.
Motion to quash indictment.
Demurrer to indictment.
Order of court, May 4th, 1915, sustaining motion to quash and demurrer to indictment.

Memoranda decision and order of court of May 4th, 1915.
26 Petition for writ of error.
Assignment of errors.
Order allowing writ of error.
Writ of error.
Citation.

FRED ROBERTSON,
United States Attorney for the District of Kansas.

The undersigned attorney for the defendant in error, Joe Freeman, acknowledges the receipt of a copy of the foregoing præcipe this 19th day of May, 1915, and joins in the request of the said United States district attorney that the transcript of record in this case be composed of the papers and exhibits as in said præcipe set forth.

PAUL A. EWERT,
Attorney for Defendant in Error.

(Indorsed:) No. 372. Criminal. In the District Court of the United States, District of Kansas, Third Division. United States of America, plaintiff, v. Frank W. Potts and Joe Freeman, defendants. Præcipe. Filed May 22", 1915, Morton Albaugh, clerk, by C. B. White, dep. clk. Fred Robertson, U. S. attorney, Topeka, Kansas.

27 UNITED STATES OF AMERICA,
District of Kansas, ss.

I, Morton Albaugh, clerk of the District Court of the United States of America for the District of Kansas, do hereby certify the foregoing to be true, full, and correct copies of the citation and acknowledgment of service; writ of error and clerk's return; report of grand jury upon return of indictment; order to docket indictment; the indictment; motion to quash indictment; demurrer to indictment; order of court sustaining motion to quash and demurrer to indictment; memoranda of decision; petition for writ of error; assignment of errors; order allowing writ of error and praecipe for transcript in a certain cause in said court pending wherein the United States of America is plaintiff and Frank W. Potts and Joe Freeman are defendants and numbered 372, criminal.

I further certify that the original citation and original writ of error are hereto attached and returned herewith.

In witness whereof I hereunto subscribe my name and affix the seal of said district court at my office in the city of Fort Scott in the said district of Kansas, this 22nd day of May, A. D. 1915.

[SEAL.] MORTON ALBAUGH, *Clerk.*
By C. B. WHITE,
Deputy Clerk in Charge of the Third Division.

(Indorsement on cover:) File No. 24753. Kansas, D. C. U. S. Term No. 1009. The United States, plaintiff in error, vs. Joe Freeman. Filed May 29th, 1915. File No. 24753.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
JOE FREEMAN.
No. 1009.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and, in accordance with the Criminal Appeals Act, 34 Stat. 1246, moves the court to advance the above-entitled cause for hearing on a day convenient to the court at the next term.

Defendant and one Frank W. Potts were charged in the District Court of Kansas with shipping and causing to be shipped in interstate commerce—to wit, from Joplin, Missouri, to Cherokee, Kansas—six trunks containing intoxicating liquors without labeling the same on the outside covers thereof, to show the name of the consignee, the nature of the contents thereof, and the quantity of liquors contained therein, in violation of section 240 of the Criminal Code of the United States.

96448—15

Defendant Freeman filed a motion to quash the indictment and a demurrer thereto on the ground *inter alia:*

That the District Court of Kansas is without jurisdiction.

The District Court sustained the motion to quash and demurrer holding *inter alia* that the offense defined by section 240 is completed whenever the packages are delivered for shipment, and therefore the district in which Joplin, Missouri, is located has exclusive jurisdiction, and the offense can not be prosecuted in the District Court of Kansas. The case was dismissed as to defendant Freeman and he was discharged.

Opposing counsel concurs in this motion.

JOHN W. DAVIS,
Solicitor General.

JUNE, 1915.

○

INDEX AND SUMMARY.

CITATIONS.

STATUTES.

DOCUMENTS.

No. 481.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

THE UNITED STATES, PLAINTIFF IN ERROR,

v.

JOE FREEMAN.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a writ of error to the District Court of the United States for the District of Kansas, brought under the criminal appeals act of March 2, 1907 (37 Stat., 1246), to review the decision on demurrer and motion to quash an indictment for unlawfully shipping and causing to be shipped intoxicating liquors in interstate traffic without labeling the outside cover of the packages containing them so as to indicate the nature of their contents, which is denounced by section 240 of the Criminal Code. The other statute considered by

the court was section 731, Revised Statutes (re-enacted as section 42 of the Judicial Code).

The intoxicating liquor was shipped in six unlabeled trunks from the city of Joplin in the State of Missouri to the county of Cherokee in the State of Kansas. The defendant was indicted by the grand jury for the Third Division of the District of Kansas, sitting at Fort Scott, the county of Cherokee, in the State of Kansas, being located and included in that division, wherein the indictment alleged the defendant in error was personally present when the offense was committed.

The motion to quash and the demurrer presented substantially identical matters of defense, viz:

1. That the indictment stated no facts sufficient to constitute against the defendant, Joe Freeman, any offense against the laws of the United States.

2. That the court was without jurisdiction to hear and try the case, because the offense, if any, was not committed within the District of Kansas, but was wholly completed in the city of Joplin, in the county of Jasper, in the State of Missouri, and consequently was without the jurisdiction of the trial court.

This defense necessarily is based upon the sixth amendment to the Constitution, providing for the trial of a crime in the district of its commission.

The Court sustained the motion to quash and the demurrer and filed a memorandum decision (Rec. 10–12).

THE INDICTMENT.

In the District Court of the United States, within and for the Third Division of the District of Kansas, at the November term thereof, A. D. 1914.

The grand jurors of the United States, within and for the Third Division of the District of Kansas, at Fort Scott, impaneled, sworn, and charged at the term aforesaid of the court aforesaid, on their oath present and charge that one Frank W. Potts and Joe Freeman, on or about the 18th day of February, A. D. 1914, in said division of said district, and within the jurisdiction of said court, in the county of Cherokee and State of Kansas, then and there being, did then and there willfully, knowingly, and unlawfully ship and cause to be shipped from the city of Joplin, in the county of Jasper, State of Missouri, into the county of Cherokee and the State of Kansas, six trunks containing spirituous and intoxicating liquor, said trunks being described as follows, to wit:

One trunk, containing four dozen quarts of whisky.

One trunk, containing three 5-gallon kegs of gin.

Four trunks, each containing three 5-gallon kegs of whisky.

Said packages, to wit, the six trunks hereinbefore described, then and there having no label on the outside cover to show the name of the consignee, the nature of the

> contents of said packages, and the quantity contained therein, and that said packages, all the while they were then and there being so shipped, did not have any label of any kind whatsoever on the outside cover to plainly show the name of the consignee, the nature of its contents, and the quantity contained therein; * * *

THE STATUTES CONSTRUED BY THE LOWER COURT.

Sections 238, 239, and 240 of the Criminal Code provide, respectively:

Section 238, in effect, that any officer, etc., of any common carrier who shall knowingly deliver to any other than the known consignee, or upon the order of consignee, any package of intoxicating liquor shall be deemed guilty of a crime.

Section 239, in effect, that any person or common-carrier who shall collect the purchase price, or who shall act as the agent of the buyer or seller of intoxicating liquors shipped in interstate traffic otherwise than in its transportation, shall be guilty of a misdemeanor.

Section 240 (which is immediately under consideration):

> Whoever shall knowingly ship or cause to be shipped from one State into another State, * * * or from any foreign country into any State of the United States, * * * any package of or any package containing any spirituous, vinous, malted, fermented, or other intoxicating liquor of any

kind, unless such package be so labeled on the outside cover as to plainly show the name of the consignee, the nature of its contents, and the quantity contained therein, shall be fined not more than five thousand dollars; and such liquor shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the seizure and forfeiture of property imported into the United States contrary to law.

Section 731 R. S. (section 42, Judicial Code):

SEC. 731. When any offense against the United States is begun in one judicial circuit (district) and completed in another, it shall be deemed to have been committed in either and may be dealt with, inquired of, tried, determined, and punished in either district in the same manner as if it had been actually or wholly committed therein.

ASSIGNMENT OF ERRORS.

First. The court erred in its decision quashing the indictment and sustaining the demurrer thereto, for the reason that the United States Court for the District of Kansas was without jurisdiction to hear and try the case, and thus erred in its construction of the statute, section 240 of the Penal Code, on which the indictment was based.

Second. The court erred in its decision that section 731 of the Revised Statutes, when applied to said section 240 of the Penal Code, did not confer jurisdiction upon the United States Court for the

District of Kansas to try the defendant upon the charge set forth in the indictment in this case. (R. 12.)

THE QUESTIONS INVOLVED.

The assignment of errors and the case present two questions:

(1) Whether the shipping of unlabeled packages of intoxicating liquor from the State of Missouri into the State of Kansas constituted a wholly completed offense under section 240 of the Criminal Code and is judicable only in the district where the act of shipment began, or whether it is a continuing offense judicable under section 731 Revised Statutes (section 42, Judicial Code) in any district through which the unlabeled packages were transported.

(2) Whether the causing to be shipped of the unlabeled packages of intoxicating liquors from the State of Missouri to the State of Kansas, while the defendant in error was within the district of Kansas, constituted an offense within that district which is judicable there under section 240 of the Criminal Code.

ARGUMENT.

I.

The United States District Court for the District of Kansas has jurisdiction of the prosecution of the defendant in error for shipping the unlabeled packages from Missouri into Kansas, inasmuch as the offense was not complete when the unlabeled packages were deliv-

ered to the carrier, but continued throughout their interstate transportation.

The indictment charges that the defendant did—

(*a*) Ship,

(*b*) Cause to be shipped,

liquor in unlabeled trunks from Missouri into Kansas.

Confining attention to the first allegation only, the question for decision is whether the words used in the statute, "ship * * * *from* one State *into* another State * * * or *from* any foreign country *into* any State of the United States," necessarily imply a crime completed upon mere delivery for shipment, and hence indictable only in the State of delivery. Such is the decision of the lower court.

The Government contends that while the words "ship" and "shipment" may in some statutes be confined in definition to "delivery for shipment," in the particular statute in question the intent of Congress was to make the crime of shipping unlabeled liquor *from* one State *into* another a continuing crime, and hence indictable both in the district where delivery of the unlabeled liquor is made and in the district into which the unlabeled liquor is introduced.

LEGISLATIVE HISTORY OF SECTIONS 238–240, CRIMINAL CODE.

The legislative history of sections 238, 239 and 240 of the Criminal Code is of high importance in de-

termining the real intent and purpose of Congress and the construction of the statutory language.

Sections 238, 239, and 240 of the Criminal Code were new legislation in all respects. During the Sixtieth Congress there were seven bills introduced in the Senate and two in the House, all seeking to regulate interstate commerce in aid of "prohibition" legislation in the several States and Territories. The Senate bills originally sought to regulate the interstate liquor traffic by subjecting interstate and international shipments of liquor to the police power of the States while in transit and before final delivery. The subject was discussed somewhat exhaustively in a report by the Senate Judiciary Committee (S. R. 499, 60th Cong.), the Committee practically agreeing that the mischief—the misuse of the facilities furnished by railroad companies and other common carriers in bringing in liquors from outside the State, to be paid for on delivery—deserved correction. There was much doubt, however, among the members of the Committee as to the constitutionality of the proposed bills, and they hesitated to recommend legislation apparently in conflict with the views of this Court, as expressed in *Vance* v. *Vandercook Company*, 170 U. S., 452.

The Committee finally reported to the Senate (Cong. Rec., Apr. 13, 1908, v. 42, p. 4662) a bill framed by it (S. 6576), commonly known as the Knox bill, containing three sections, which corre-

sponded in substance with sections 238–240 of the Criminal Code. The third section of the bill (section 240 of the Code), regarding labeling of packages of liquors designed for interstate shipments, was recommended, as stated by the Committee, to enable " the several States to trace and control the disposition and use of such liquors under their own police powers."

During the passage of the Criminal Code through the House, the three sections of the Knox bill were substantially engrafted upon it as sections 238–240, section 240 in particular remaining practically unchanged (Cong. Rec., Feb. 7, 1909, v. 43, pp. 2583–2585). This amendment was agreed to in conference, and there was no debate upon the adoption of the conference report adding the sections to the code in either House. (Cong. Rec., Mar. 3, 1909, v. 43, p. 3791.)

An elaborate review of the legislative history of these sections and the circumstances under which they became a part of the Criminal Code is given in *United States* v. *87 Barrels of Wine,* 180 Fed., 215, 216, 217; and it, as well as the history of preceding legislation of the same character, is reviewed in *United States Express Company* v. *Friedman* (1911, C. C. A., 8th Cir.), 191 Fed., 673, 681.

From the history of the legislation, these three sections must be considered and construed as constituting a single statute. Considered thus, it appears that the purpose of Congress in sections 238, 239 was to destroy the practice of shipping

packages of liquors C. O. D. to consignees in prohibitory States, there to be delivered by the carrier or its agent to any person calling for them and paying the C. O. D. prices marked upon them, which the carrier remitted to the consignor. It appears equally clear that the purpose of section 240 was to require such shipments to be so conspicuously labeled as to their contents and marked with the name of the consignee that they might be seized and the consignees apprehended by the officers of the prohibitory or "dry" State into which the liquors were shipped. Plainly, the legislation was enacted to supplement and aid State legislation against the traffic in intoxicating liquor, which up to that time had been seriously hampered because of the inability of the States to interfere with interstate commerce. The Federal Constitution, in other words, had been used as a cloak for the common and notorious violation or evasion of the prohibitory laws of the "dry" States. The stripping of this cloak to the extent of preventing the carriage of liquors in an unlabeled condition is the main object aimed at in section 240.

PROPER CONSTRUCTION OF THE STATUTE.

The whole power of Congress to legislate upon the subject is derived from the fact that the liquor in question is in interstate traffic. It is only because liquor may be shipped *from* one State *into* another, or *from* a foreign country *into* a State that Congress may deal with it.

As was stated in *Kirmeyer* v. *Kansas* (1915) 236 U. S., 568, 572:

> The right to send it from one State to another and the act of doing so are interstate commerce the regulation whereof has been committed to Congress; * * *. Transportation is not complete until delivery to the consignee or the expiration of a reasonable time therefor * * *

The Government contends that when Congress, in the present statute, forbade a person to ship unlabeled liquor *from* one State *into* another, it forbade an act which was to be continuous in its nature and not fully performed until its interstate character was ended.

The subject of legislation was the right to introduce unlabeled liquors from one State into another State; and the word "ship" is used in the same sense as in the phrase "continuous carriage or shipment" in the Interstate Commerce Act of February 4, 1887, c. 104, sections 1, 2, as amended (Comp. Stat., sec. 8563); and as "introduced into any State . . . from any State" in the Falsely Labeled Dairy or Food Products Act of July 1, 1902, c. 1357, sec. 1 (32 Stat., 632); and as "transported into any State" in the Wilson Liquor Act of August 8, 1890, c. 728 (26 Stat., 313); and as "shipment or transportation in any manner or by any means whatsoever" in the Webb Liquor Act of March 1, 1913, c. 90 (37 Stat., 699).

It is to be especially noted that whenever Congress has intended to make penal the mere act of delivery for transportation or delivery for shipment it has made specific provision therefor, and carefully distinguished between the word "ship," which implies continuity of performance, and "deliver for shipment," which implied a single completed act.

See *Pure Food and Drug Act* of June 30, 1906, c. 3915, sec. 2 (34 Stat., 768):

> The *introduction* into any State * * * from any other State * * * or from any foreign country of any article of food or drugs which is adulterated or misbranded within the meaning of this act is hereby prohibited; and any person who shall ship or *deliver for shipment from* any State * * * *to* any State * * *.

Nursery Stock Act of Aug. 20, 1912, c. 308 (37 Stat., 316–318):

> *delivered for shipment* * * *.
>
> (SEC. 2): "No person shall ship or *offer for shipment* from one State * * * into any other State;"
>
> (SEC. 4): "No person shall ship or *deliver for shipment* from one State * * * into any other State;"
>
> (SEC. 8): "No person shall ship or *offer for shipment.*"

Insecticide Act of April 26, 1910, c. 191, sec. 2 (36 Stat., 331):

> The introduction into any State * * * from any other State * * * or from any country or shipment to any foreign country of any insecticide * * * which is adulterated or misbranded within the meaning of this act is hereby prohibited; and any person who shall ship or *deliver for shipment* from any State * * * to any other State or to a foreign country * * *.

Virus Act of March 4, 1913, c. 145, sec. 1 (37 Stat., 832):

> ship or *deliver for shipment* from one State * * * to any other State.

Meat Inspection Act of March 4, 1907, c. 2907, sections 8–17 (34 Stat., 1262–1264):

> No person, firm, or corporation shall transport *or offer for transportation.*
>
> No person, firm, or corporation engaged in the interstate commerce or meat or meat food products shall transport *or offer for transportation.*

Diseased Live Stock Acts of May 29, 1884, c. 60, sec. 6 (23 Stat., 32), and March 3, 1905, c. 1496, sec. 2 (33 Stat., 1264):

> Nor shall any person, company, or corporation *deliver for such transportation* to any railroad company.

Unsound Carcasses Act of March 2, 1891, c. 555, sec. 5 (26 Stat., 1090):

> It shall be unlawful for any person to transport * * * or for any person to deliver *to another for transportation* from one State * * * into another State.

Lottery Law (section 237, Federal Penal Code):

> Whoever shall knowingly deposit or cause to be deposited with any express company or other common carrier for carriage from one State * * * to any other State.

Game Law (section 242, Federal Penal Code):

> It shall be unlawful for any person to deliver to any common carrier for transportation, or for any common carrier to transport from any State * * * to any other State.

Obscene Books Law (section 245, Federal Penal Code):

> Whoever shall knowingly deposit or cause to be deposited with any express company or other common carrier for carriage from one State * * * to any other State.

In the present statute, Congress has used the words "cause to be shipped" as a broad term which not only includes "deliver for shipment," "deliver for transportation," and "offer for transportation," but also other acts of causation which might occur either in the State where the delivery for shipment was made, or which might

occur in some other State where the person who was the originating cause was physically present.

Since the forbidden act of causing to ship will include a delivery for shipment, the word " ship " must be given some other and distinct meaning and legal effect. In order to give it such effect, the word " ship " can not be dissociated from the words " from one State " and " into another State; " and shipment within the intent of the statute must be held to mean the bringing about of the passage of unlabeled liquors from one State into another, the sending by some medium of transport; i. e., action which is not completed merely in the State of its origin.

It is in the latter sense that the words " ship " and " shipment " have been most ordinarily employed by this Court, as well as in common public usage. Thus, *per* Mr. Justice White in *American Steel & Wire Co.* v. *Speed* (1904) 192 U. S., 500, p. 520, the words " shipped from one State to another " were used in the sense of " transported."

So *per* Mr. Justice Day in *Adams Express Co.* v. *Kentucky* (1915) 238 U. S., 190, the phrases " interstate shipments," " liquor shipped in interstate commerce," " shipment of liquor in interstate commerce," " the subject matter of such interstate shipment," are used as denoting not merely a delivery for shipment, but an actual carriage or continuing act.

The same use of the word " shipment " as denoting something more than mere " delivery for ship-

ment" is found in *Rhodes* v. *Iowa* (1898), 170 U. S., 412, where Mr. Justice White said (p. 419):

> The fundamental right which the decision in the *Bowman case* held to be protected from the operation of State laws by the Constitution of the United States was the *continuity of shipment* of goods coming from one State into another from the point of transmission to the point of consignment and the accomplishment there of the delivery covered by the contract.

In *United States* v. *Smith* (1902) 115 Fed., 423, the court, construing a similar statute—the Game Law (Federal Penal Code, Section 242)—said (226, 227):

> I do not mean that the game or packages must have been actually put into vehicles by which the *shipment is to be accomplished.* A delivery to a common carrier is made unlawful, as well as the actual transportation of it. Interstate commerce has clearly begun, so as to bring the case within the power of Congress to regulate *when there has been such a delivery;*

thus using the word "shipment" as synonymous with "transportation," and as distinguished from mere delivery to the carrier.

See also *West Virginia* v. *Adams Express Co.* (1915 C. C. A., 4th Circ.), 219 Fed., 794, 797.

It is not denied, of course, that in statutes unconnected with interstate commerce the word "ship,"

or "shipment," ordinarily denotes a single completed act of delivery to the carrier.

See *Ledon* v. *Havemeyer* (1890), 121 N. Y., 179, 185–188;
Harrison v. *Fortlage* (1896), 161 U. S., 57, 63, 64;
Southern Steel, etc., Co. v. *Hickman* (1911), 190 Fed., 890;
Garfield Coal Co. v. *Penn. Coal Co.* (1908), 199 Mass., 23, 38, 39;
Fechteler v. *Whitmore* (1910), 205 Mass., 6, 11.

But these decisions almost invariably are concerned with the significance of the word when used in the law of sales and kindred subjects.

PRACTICAL EFFECT OF THE LOWER COURT'S CONSTRUCTION OF THE STATUTE.

This Court can not ignore the actual liquor situation in the United States, nor the differing policies as to regulation and prohibition of the sale and use of liquor in the so-called "wet" and "dry" States. As stated *supra* (p. 10), the evident intent of Congress in this statute was to aid the enforcement of the prohibitory laws in "dry States." A similar intent has become even more clear since the passage of the Webb Act in 1913. Can it be possible that Congress in 1909 intended that violations of this section 240 should be prosecuted only in the Federal District Court in States which in the particular instance had no interest in its enforce-

ment, or for whose protection it was not then necessary, or the officers in which would feel no impelling obligation to "trace and control the dispensation and use of such liquors"? Yet such would be the result of the construction given to the statute by the lower court. On its construction, the prosecution can only be in a State where the liquor is delivered for shipment. This necessarily would ordinarily be a "wet" State.

CONSIDERATION OF THAT PORTION OF THE STATUTE RELATING TO SHIPPING FROM FOREIGN COUNTRIES.

If we consider separately that portion of the statute which makes it a crime to "ship or cause to be shipped * * * *from* any foreign country *into* any State of the United States," it at once becomes apparent that the construction given by the lower court will largely emasculate the statute. Congress certainly intended by its language to enact a crime with reference to foreign shipments of unlabeled liquors; and as certainly it intended that violations of the law should be indictable. On the lower court's theory, the efficacy of the statute disappears in an empty puff of wind. As a test: suppose A in Canada, on B's order sent from Maine, ships unlabeled liquor to B in Maine, and B receives the liquor in Maine; against whom and where could indictments lie? Under the lower court's decision, neither A nor B could be indicted in Maine, and certainly they could not be reached by Federal process

in Canada. Thus, the statute becomes an entire nullity so far as it penalizes this whole large class of unlabeled shipments from foreign countries into any State of the United States.

Clearly, any construction which would result in paralyzing the operation of a considerable portion of a Federal statute is to be avoided.

The language of Mr. Justice White in *Rhodes* v. *Iowa* (1898), 170 U. S., 412, 421, 422, is particularly appropriate here:

> The words "shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory," in one sense might be held to mean arrival at the State line. But to so interpret them would necessitate isolating these words from the entire context of the act, and would compel a construction destructive of other provisions contained therein. But this would violate the fundamental rule requiring that a law be construed as a whole and not by distorting or magnifying a particular word found in it.
>
> * * * But the subtle signification of words and the niceties of verbal distinction furnish no safe guide for construing the act of Congress. On the contrary it should be interpreted and enforced by the light of the fundamental rule of carrying out its purpose and object, of affording the remedy which it was intended to create, and of defeating the wrong which was its purpose to frustrate.

See also *United States* v. *Wiltberger* (1820), 5 Wheat., 76, quoted and cited with approval in *United States* v. *Harris* (1899, 177 U. S., 305, 310), in which Chief Justice Marshall said (p. 93):

> But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim and amounts to this, that though penal statutes are to be construed strictly, *they are not to be construed so strictly as to defeat the obvious intention of the legislature.* The maxim is not to be applied so as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature obviously used them, would comprehend. * * *

See also *United States* v. *Hartwell* (1867), 6 Wall., 385; *United States* v. *Union Supply Co.* (1909), 215 U. S., 50, at p. 55.

CONSIDERATION OF CASES CLAIMED TO BE ADVERSE.

The Davis case.

The court below stated in its memorandum opinion (Record, p. 10) that it followed *Davis* v. *United States* (1900, C. C. A., 6th Circ.), 104 Fed., 136, as a case in point.

There, as here, the only question involved was the continuing or the completed character of the offense; and as to this, the court (per Mr. Justice Day) said (p. 139):

> This brings us to consider what is the nature of the offense and where does it be-

come complete. The thing aimed at in this section of the act is to prevent undue advantages which will accrue to a shipper who obtains lowered rates by means of false classification, billing, etc. This rate is manifestly obtained *where* the goods are billed by the carrier for transportation. *It is not the transportation of the goods which is prohibited and punished, but the obtaining of the transportation by means of false and fraudulent conduct, which is the gist of the offense.* What is it, then, to obtain transportation in the sense of this statute? We think that false billing or other misrepresentation of the goods, as stated in the act, which results in their *being received by the carrier under a contract of carriage thus fraudulently obtained,* is the obtaining of transportation within the meaning of the statute.

If the carriage of the goods was the thing aimed at in this statute, and such was to have been deemed fraudulent per se, the crime might be regarded as a continuing one. As we have already said, it is the obtaining of the transportation by the acts denounced in the statute which is the gist of the offense. *Then the fraudulent conduct of the shipper has borne its fruit, and every act and intent which constitutes the offense is complete.*

The *Davis case* does not appear analogous to that at bar; for it was the attempt to defraud the carrier and to obtain an undue advantage over competitors by way of securing lower transportation

rates that constituted the gist of the offense and rendered it complete when the lower rates were obtained.

In the case at bar, however, the statute was unquestionably enacted, as stated *supra,* in aid of State legislation in those States where traffic in intoxicating liquors was forbidden. It was not against the mere delivery for shipment of unlabeled packages that Congress directed its attack; but " the carriage of the goods " in such condition and their introduction into " dry " States were the things aimed at. Unlike the *Davis case,* in the case at bar the conduct of the shipper had not, as stated by Mr. Justice Day, " borne its fruit, and every act and intent which constitutes the offense " had not become complete. The intent to deceive continued until delivery.

Mr. Justice Day in the case of *Armour Packing Company* v. *United States,* (1908) 209 U. S., 56, 74, 75, sustained this view when he said:

> Congress doubtless had in mind that some of these offenses might be complete in a single district; some might be begun in one and completed in another; and those wherein transportation — actual carriage — was made an essential element might continue through several districts, and hence undertook to provide places for trial of any offense which might be committed against the provisions of the act. It is at least certain that these sections, construed together, make

an offense of obtaining transportation at a concession from the published rate, which shall be triable in any district through which it is had. That is the offense of which the accused is charged in this case, and such is the district in which it was tried.

It is contended that the contrary was held in the case of *Davis* v. *United States*, 104 Fed. Rep., 136, decided in the Circuit Court of Appeals for the Sixth Circuit. In that case the prosecution was for false billing by the shipper, under par. 10 of the act of 1889, wherein the statute provided punishment for the offense in a *single* district, and it was there held that the crime was complete in the district in which the false billing was made and the goods delivered to the carrier for transportation, and *that its actual carriage was not an essential element of the offense;* and that a prosecution in Texas for goods falsely billed and delivered to the carrier in Ohio could not be maintained.

It is true that in the *Armour case* the act of Congress made the offense cognizable in every district through which the goods might pass, while here no particular district is specified; but it will be noted that Mr. Justice Day in the *Davis case* distinctly based his decision in part upon the language of the statute limiting the prosecution to the single district *"where the offense was completed,"* which is not found here. He further stated that in the *Davis case* the " actual carriage was not an *essential element of the offense,"* while in the instant

case it is contended that the *actual carriage* is the most vital element.

The Chavez case.

In *United States* v. *Chavez* (1913) 228 U. S., 525, this Court had under consideration the joint resolution of March 14, 1912, making unlawful "the export of arms or munitions of war from any place in the United States" to any American country where conditions of domestic violence exist, and punishing "any shipment of material hereby declared unlawful." The facts must be particularly considered in connection with the decision. The defendant was indicted for transporting munitions on his person in Texas with intent to export to Mexico. The court had to consider whether these facts alone, without allegations of actual export, constituted a crime in Texas. If the court should hold that these facts did not present an indictable crime, punishment would be impossible in the large class of cases where the defendant himself took the munitions into Mexico and remained there. There was no question before the court as to a continuing crime or not; and no question of venue or the applicability of Rev. Stat., 731 (Judicial Code, section 42) was involved, inasmuch as the offense if a continuing one was completed not in another judicial district of the United States but in a foreign country.

The Court, per Mr. Chief Justice White held (p. 530), despite the fact that "exportation in the com-

plete sense consists of two essential ingredients—the sending of merchandise from this to a foreign country and its landing in such country," nevertheless this ordinary meaning of "export" was to be controlled and cut down by the remaining language of the statute and by the evidence therein contained of legislative intent. Hence, the shipment penalized was held to be indictable, even without proof of the entry of the arms into the country to which they were to be exported.

P. 532:

> * * * to have merely prohibited and punished the export, in the complete sense, of arms and munitions, would not have served to prevent the continued future delivery of such arms, etc., except as the anticipation of punishment might serve as a deterrent.

In other words, the Court decided that in the particular piece of legislation before it, the word "shipment" was to be given a narrow construction in order to effectuate the intent of Congress as disclosed in the whole joint resolution and in the evils against which it was directed.

In the case at bar, the Government contends that looking at the evils intended to be counteracted and the results which Congress clearly intended to achieve, the word "ship" is to be given a broader meaning. Certainly, if, as in the *Chavez case,* the word "export" can be controlled and its usual meaning limited by the use of the word "shipment" in the same legislation, then in the statute

in the case at bar it would seem that the word "ship" may be controlled by the remainder of the statute.

The Hopkins case.

In *United States* v. *J. L. Hopkins & Co.* (1912), 199 Fed., 649, the defendant corporation located in New York, in the Southern District of New York, was indicted in the Eastern District of New York for violation of the Pure Food & Drugs Act (34 Stat., 768), by delivering goods to a carrier in Brooklyn, consigned to Virginia. The defendant contended (a) that it could be indicted *only* in Virginia and that the crime was *only* that of introducing the goods into another State; (b) that it could be indicted only in the Southern District of New York where the corporation was actually located and corporately acted. The decision of the court, upholding the indictment in the Eastern District of New York, was clearly correct, for the statute specifically penalized "whoever shall ship *or deliver for shipment,*" and the delivery for shipment took place in Brooklyn. There is nothing whatever in the decision which would support the view that the court decided that the defendant could not also have been indicted in Virginia. The court's statement (p. 652) that "the shipping or offering for shipment * * * is the act of starting the shipment of the goods by some common carrier or other means of transportation, having as its first step a delivery for shipment," is not incon-

sistent with the doctrine that a "shipping" when once started is a process which continues until delivery to the consignee.

It is not contended by the Government in the case at bar that an indictment would not *also* have lain in Missouri as well as in Kansas.

The Government's contention is that even if the offense of shipping began in Missouri, it was not necessarily wholly completed there, but continued into Kansas, and might be prosecuted in either jurisdiction.

Revised Statutes, Section 731;

In re Palliser (1890), 136 U. S., 257;

Putnam v. *United States* (1896), 162 U. S., 687; and cases infra, pp. 33, 34.

II.

The United States District Court for the District of Kansas has jurisdiction of the prosecution of the defendant in error for causing the unlabeled packages to be shipped from Missouri into Kansas.

In part, the indictment charges:

> The grand jurors of the United States, within and for the third division of the distric of Kansas, at Fort Scott, * * * charge that one Joe Freeman, in said division of said district, and within the jurisdiction of said court, in the county of Cherokee and State of Kansas, *then and there being,* did then and there willfully, knowingly, and unlawfully * * * *cause to be shipped* from the city of Joplin, in the county of

> Jasper, State of Missouri, into the county of Cherokee and the State of Kansas, six trunks containing spirituous and intoxicating liquor, said trunks being described as follows, to wit: * * * etc.

As will be noted, the offense of *causing the illegal shipment to be made* is distinctly charged to have been committed by the defendant in error while he was physically present in the district of Kansas. There are no facts set out in the indictment, either directly or inferentially, contradictory of or at variance with the charge made. The indictment does not state the method employed by the defendant in error in causing the illegal shipment to be made; but it could have been done by mail, telegraph, or telephone, or by personal messenger. The method employed, however, in causing the illegal shipment to be made is immaterial.

This Court has plainly indicated that where an indictment properly charges an offense to have been committed within a district, and there is nothing in the indictment to indicate to the contrary, it is not demurrable. In *Benson* v. *Henkel* (1905), 198 U. S., 1, 15, it was said:

> Appellant makes further objection to a removal to the District of Columbia upon the ground that the offense, if any, was committed in California, and that under the Constitution he is entitled to a trial in that jurisdiction.
>
> The objection does not appear *upon the face of the indictment,* which charges the of-

> fense to have been committed within this District * * *.

See *Foster's Federal Practice* (5th ed., 1913), vol. 2, sec. 517, p. 1706:

> No objections which do not appear upon the face of the indictment can be raised by demurrer.

See also *United States* v. *Murphy* (1898), 91 Fed., 120, 121:

> I hold that, *as the indictment lays the venue of the case in this district, and specifies acts committed by the defendant within this district,* said acts are to be considered as material and essential to be proved to justify a conviction under the indictment; and the case is cognizable in this court for the reason that the *indictment accuses the defendant of a crime committed within the territorial limits of the court's jurisdiction.*

The lower court's decision was based wholly upon the demurrer to the jurisdiction. As an inspection of the memorandum decision of the court (Rec., 9–11) will disclose, the general demurrer was not considered. It is distinctly stated in its memorandum that " the indictment, had it been returned in the proper district, undoubtedly states an offense under section 240 " (Rec., p. 10); but the court held that the offense was completed in the State of Missouri " whenever the packages were delivered for shipment " (Rec., p. 10), and that the United States District Court for the district in which the

delivery was made " has exclusive jurisdiction for the prosecution of the offense." The Government maintains that in the absence of allegations of fact in the indictment contradicting those set out in the charging portion quoted it is impossible for this Court to decide from the facts alleged in the indictment that the offense of *causing the unlabeled packages to be shipped* from Missouri could not have been committed in the District of Kansas. Yet, in order to sustain the lower court's decision on this branch of the case, this Court must decide that, *as a matter of law,* a man in Kansas could not commit the crime of causing to be shipped in Missouri unlabeled liquor in violation of the statute. In other words, the defendant must convince this Court that, although he was physically present in Kansas, he could not there, *as a matter of law,* cause to be shipped unlabeled liquor from Missouri into Kansas in violation of the statute.

The Government, on the other hand, contends that a crime in law is stated when the indictment alleges that the defendant in error, physically present in the Kansas district, *caused to be shipped* from Joplin into Kansas unlabeled trunks containing intoxicating liquor; and such crime is legally triable in the Kansas district.

That causing an act to be done may be a crime begun in one place and completed in another, and hence indictable in both, is made clear by the decisions which define what form or degree of causation constitutes the crime.

Thus, in *Burton* v. *United States* (1906, C. C. A., 8th Circ.), 142 Fed., 62 (affirmed in [1906] 202 U. S., 344, 389), for causing nonmailable matter to be deposited in the mail, Mr. Justice Van Devanter said:

> It was not essential that he (Malchow) should have directly participated in the act of mailing, for if he caused it to be done he was within the terms of the statute; and in legal contemplation, he did cause it to be done if by his authorization or with his knowledge and acquiescence it was done by Burton in the execution of their joint enterprise.

So Mr. Justice Van Devanter, in *Demolli* v. *United States* (1906, C. C. A., 8th Circ.), 144 Fed., 363, 365, 366:

> Nor is it essential to the commission of the offense that the objectionable matter be deposited in the mail by the offender himself or by another acting under his express direction, because he is equally responsible if it is deposited therein, as a natural and probable consequence of an act intentionally done by him with knowledge at the time that such will be its natural and probable result.
>
> * * * * *
>
> He set in operation and made use of an agency which he knew at the time would according to its established and regular course carry the objectionable matter through the mail * * *.

See also *Bates* v. *United States* (1881), 10 Fed., 92, 95, in which it was held, under Rev. Stat., sec. 3893:

> The language of the statute shows clearly that it was intended to prevent any one from violating the law by another as well as by himself, and the jury were specially instructed by the district court that they must be satisfied that the act done was authorized by the plaintiff in error; in other words, that he caused it to be done through another.

United States v. *Bebout* (1886), 28 Fed., 522;
United States v. *Bickford* (1859), 4 Blatchf., 337;
United States v. *White* (1885), 25 Fed., 716.

It is well settled in general that an offense against the laws of the United States may be prosecuted in the district in which it was initiated, as well as that in which it was completed, where, as in this case, no venue is specially fixed by the statute creating the offense.

Revised Statutes, sec. 731;
Judicial Code, sec. 42;
Wharton's Criminal Law (11th Ed., 1912), sec. 334, vol. 1, p. 423:

> Arguing by analogy from the law which makes the place of performance the seat of a contract, it might be said that the place of consummation is the peculiar seat of the crime. So, in fact, under the common law, it has frequently been decided, *though it is settled that a concurrent jurisdiction exists*

> *in the place of starting the offense, supposing that the offense is indictable in* the place of consummation. . . .

and authorities cited.

Ibid., sec. 324, pp. 404, 405:

> A party who in one jurisdiction puts in operation a force which does harm in another jurisdiction is *responsible in both jurisdictions for the harm.* That he is responsible in the place where he starts the wrong will be hereafter seen.

Bridgeman v. *United States* (1905, C. C. A., 9th Cir.), 140 Fed., 577, 591. In this case the defendant was indicted in Montana for there making and causing to be made and presenting and causing to be presented to the Department of the Interior at Washington, a false voucher against the United States. The Court held that the offense was at least commenced in the State of Montana and fell clearly within the provisions of section 731 R. S.

See also *In re Palliser* (1890), 136 U. S., 257, 267;

Putnam v. *United States* (1896), 162 U. S., 687;

Stillman v. *White Rock Mfg. Co.* (1847), 23 Fed. Cas. No. 13446;

Dealy v. *United States* (1894), 152 U. S., 539, 547;

Benson v. *Henkel* (1905), 198 U. S., 1, 15;

Hyde v. *Shine* (1905), 199 U. S., 62, 77;

United States v. *Thayer* (1908), 209 U. S., 39, 44;

Haas v. *Henkel* (1910), 216 U. S., 462, 475, 476;

United States v. *Murphy* (1898), 91 Fed., 120, 121;

Perara v. *United States* (1915, C. C. A., 8th Cir.), 221 Fed., 213, 217;

Simpson v. *State* (Ga., 1893), 44 Am. St. Rep. 75, and note.

It is respectfully submitted that even if the court correctly construed the law in holding that the offense of causing the illegal shipment to be made was *completed* in Missouri, the indictment clearly charged that the crime was *begun* in Kansas, and the venue of its prosecution may be laid in either jurisdiction in compliance with the Sixth Amendment.

If, under the doctrine laid down by the lower court, not only the shipment but the causing to ship *must* be prosecuted in the district where the delivery for shipment was made, how can any effect whatever be given to that portion of the statute which makes it a crime to " ship or cause to be shipped * * * *from* any foreign country *into* any State of the United States? The place of delivery for shipment in such a case being always a foreign country, no violation of the law can ever be indicted.

Will this Court support a construction of the statute which shall educe such an impotent and nugatory result from Congressional legislation?

CONCLUSION.

It is respectfully submitted that the judgment of the United States District Court for the district of Kansas should be reversed, and the defendant ordered to stand for trial in that court.

CHARLES WARREN,
Assistant Attorney General.

OCTOBER, 1915.

○

UNITED STATES v. FREEMAN.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

No. 481. Argued October 21, 1915.—Decided November 15, 1915.

The act prohibited by § 240, Criminal Code, making it punishable to ship or cause to be shipped from one State into another State or from a foreign country into a State, a package of intoxicating liquor not marked as required by the statute is essentially a continuing act the performance whereof is begun when the package is delivered to the carrier and completed when it reaches its destination.

The word "ship" as used in § 240, Criminal Code, is not used in the sense of "deliver for shipment," making the offense a completed one upon delivery of the goods.

A criminal statute applicable alike to shipments in interstate and foreign commerce will not be so construed as to render it obviously futile as to foreign commerce; it should be so construed, if its words permit, as to cause it to reach both classes of shipments and to accomplish the object of its enactment.

Section 240, Criminal Code, refers to the continuing act of shipping goods whereby the transportation into a State is accomplished, and the District Court within the State into which the goods are shipped has jurisdiction of the offense under § 42, Judicial Code, as well as the District Court within the State from which the goods are shipped.

THE facts, which involve the jurisdiction of the District Court of the offense of shipping intoxicating liquor in interstate and foreign commerce in violation of, and the construction of § 240, Criminal Code, are stated in the opinion.

Mr. Assistant Attorney General Warren for the United States:

The United States District Court for the District of Kansas has jurisdiction of the prosecution of the defendant in error for shipping the unlabeled packages from Missouri into Kansas, inasmuch as the offense was not complete when the unlabeled packages were delivered to the carrier, but continued throughout their transportation.

The offense "causing" to be shipped constitutes a separate crime from "shipping" and is capable of performance in a separate district.

In support of these contentions, see *Adams Exp. Co.* v. *Kentucky*, 238 U. S. 190; *American Steel Co.* v. *Speed*, 192 U. S. 500; *Armour Packing Co.* v. *United States*, 209 U. S. 56; *Bates* v. *United States*, 10 Fed. Rep. 92; *Benson* v. *Henkel*, 198 U. S. 1; *Bridgeman* v. *United States*, 140 Fed. Rep. 577; *Burton* v. *United States*, 142 Fed. Rep. 62; *Davis* v. *United States*, 104 Fed. Rep. 136; *Dealy* v. *United States*, 152 U. S. 539; *Demolli* v. *United States*, 144 Fed. Rep. 363; *Fechteler* v. *Whitmore*, 205 Massachusetts, 6; 2 Foster's Fed. Prac. (5th ed.), p. 1706; *Garfield Coal Co.* v. *Penn Coal Co.*, 199 Massachusetts, 23; *Haas* v. *Henkel*, 216 U. S. 462; *Harrison* v. *Fortlage*, 161 U. S. 57; *Hyde* v. *Shine*, 199 U. S. 62; *Kirmeyer* v. *Kansas*, 236 U. S. 568; *Ledon* v. *Havermeyer*, 121 N. Y. 179; *In re Palliser*, 136 U. S. 257; *Perara* v. *United States*, 221 Fed. Rep. 213; *Putnam* v. *United States*, 162 U. S. 687; *Rhodes* v. *Iowa*, 170 U. S. 412; *Simpson* v. *State*, 44 Am. St. Rep. 75; *Southern Steel Co.* v. *Hickman*, 190 Fed. Rep. 890; *Stillman* v. *White Rock Co.*, 23 Fed. Cas. No. 13446; *United States* v. *Bebout*, 28 Fed. Rep. 522; *United States* v. *Bickford*, 4 Blatchf. 337; *United States* v. *Chavez*, 228 U. S. 525; *United States* v. *87 Barrels*, 180 Fed. Rep. 215; *United States* v. *Harris*, 177 U. S. 305; *United States* v. *Hartwell*, 6 Wall. 385; *United States* v. *Hopkins Co.*, 199 Fed. Rep. 649; *United States* v. *Murphy*, 91 Fed. Rep. 120; *United States* v. *Smith*, 115 Fed. Rep. 423; *United States* v.

Thayer, 209 U. S. 39; *United States* v. *Union Supply Co.*, 215 U. S. 50; *United States* v. *White*, 25 Fed. Rep. 16; *United States* v. *Wiltberger*, 5 Wheat. 76; *U. S. Express Co.* v. *Friedman*, 191 Fed. Rep. 1673; *Vance* v. *Vandercook Co.*, 170 U. S. 438; *West Virginia* v. *Adams Exp. Co.*, 219 Fed. Rep. 797; Wharton, Crim. Law (11th ed.), Vol. 1, pp. 404, 423.

There was no appearance or brief for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is an indictment under § 240 of the Criminal Code making it a punishable offense knowingly to "ship or cause to be shipped from one State, . . . into any other State, . . . or from any foreign country into any State, . . ." any package of or containing intoxicating liquor of any kind, "unless such package be so labeled on the outside cover as to plainly show the name of the consignee, the nature of its contents, and the quantity contained therein." The indictment was returned in the District of Kansas and charges the defendant with violating the statute by knowingly shipping and causing to be shipped from Joplin, Missouri, into Cherokee County, Kansas, six unlabeled trunks severally containing from twelve to fifteen gallons of intoxicating liquor. By a motion to quash and a demurrer it was objected that the offense denounced by the statute is complete when the package is delivered to the carrier for shipment, and therefore that the offense charged was not cognizable in the District of Kansas but only in the Western District of Missouri. Acceding to this construction of the statute, the District Court sustained the motion to quash and the demurrer and entered a judgment discharging the defendant. The Government brings the case here under the

Criminal Appeals Act, of March 2, 1907, c. 2564, 34 Stat. 1246.

As usually understood, to ship a package *from* one State *into* another or *from* a foreign country *into* a State is to accomplish its transportation from the one into the other by a common carrier, and is essentially a continuing act whose performance is begun when the package is delivered to the carrier and is completed when it reaches its destination. We think it is to such an act that the statute refers. To reach a different conclusion the word "ship" must be read as if it were "deliver for shipment." No doubt it sometimes has that meaning, but it plainly is not so used in this instance. The statute deals with shipping liquor from a foreign country into a State as well as with shipping it from one State into another State. It puts both upon the same plane and makes them equally criminal. Whatever marks the completion of the offense in one likewise marks it in the other. If it be the delivery to the carrier in the case of interstate shipments it equally is this delivery in the case of shipments from a foreign country. And yet all will concede that Congress did not intend to do anything so obviously futile as to denounce as criminal an act wholly done in a foreign country, such as is the delivery to the carrier where the shipment is from a foreign country into a State. So, if its words permit, as we think they do, the statute must be given a construction which will cause it to reach both classes of shipments, and thereby to accomplish the purpose of its enactment. *United States* v. *Chavez*, 228 U. S. 525. This, we think, requires that it be construed as referring to the continuing act before indicated whereby the transportation *into* a State is accomplished, whether the package comes from another State or from a foreign country. In this view the completion of the offense will always be within a jurisdiction where the statute can be enforced.

The District Court rightly recognized that, under Jud. Code, § 42, formerly Rev. Stat., § 731, the offense charged was cognizable in the District of Kansas, as well as in the Western District of Missouri, if the place to which the packages were transported was the place of the completion of the offense.

Therefore nothing need be said upon that point.

Judgment reversed.